

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER

IN THE MATTER OF:

KUM & GO, L.C.

LUST NO. 9LTO39, USI NO. 198600274

**ADMINISTRATIVE
CONSENT ORDER
2011-UT-03**

TO:

Kum & Go, L.C.
Environmental Department
6400 Westown Parkway
West Des Moines, IA 50266

Gary Reynolds, Compliance Manager
Kum & Go, L.C.
6400 Westown Parkway
West Des Moines, IA 50266

I. SUMMARY

The Iowa Department of Natural Resources (Department) and Kum & Go, L.C. (Kum & Go) hereby agree to the following Administrative Consent Order (Order). Kum & Go agrees to pay an administrative penalty of \$10,000 to the Department. See Sections IV and V for more details.

Any questions regarding this Order should be directed to:

Relating to technical requirements:

Tom Collins
Iowa Department of Natural Resources
Henry A. Wallace Building
Des Moines, Iowa 50319-0034
Ph: 515/281-8879

Relating to legal requirements:

Aaron Brees, Attorney
Iowa Department of Natural Resources
Des Moines, Iowa 50319-0034
Ph: 515/281-5965
aaron.brees@dnr.iowa.gov

Payment of penalty to:

Director of the Iowa DNR
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 50321-0034

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II. JURISDICTION

This order is issued pursuant to Iowa Code sections 455B 474(1)(f)(11) and 455B 476, which authorize the Director of the Department to issue any order necessary to secure compliance with Iowa Code chapter 455B, Division IV, Part 8 and Department rules contained in chapter 567 Iowa Administrative Code (I.A.C.) 135. Iowa Code section 455B 109 and administrative rules in chapter 567 I.A.C. 10 authorize the Director to assess administrative penalties up to \$10,000.

III. STATEMENT OF FACTS

The Department and Kum & Go hereby agree to the following statement of facts:

1. Kum & Go was the registered owner and is the registered operator of a facility containing three 8,000 gallon petroleum underground storage tanks (USTs) located at 136 Lincoln Way, Nevada, Iowa 50201. This facility is a convenience store engaged in the retail sale of gasoline.
2. On August 31, 2007, a leaking dispenser was discovered during a compliance inspection by compliance inspector Brian Pottebaum. Mr. Pottebaum noted the "pumping unit (weep hole) leaking in #1/2 [west] suction dispenser."
3. On January 3, 2010, gasoline and/or diesel vapors were reported from multiple residences in the area surrounding the Kum & Go facility.
4. On January 5, 2010, personnel from the Nevada Fire Department and the Department's Field Office 5 investigated. In addition to confirming the petroleum smell in residences, staff noted that the Kum & Go was a LUST site and that the Automatic Tank Gauging (ATG) system was in alarm, with one tank showing an invalid test and another showing a failed test.
5. On January 7, 2010, a Kum & Go customer reported a leak in the westernmost dispenser to Kum & Go staff. Kum & Go attempted to repair the leak on January 8.
6. On January 11, 2010, Department staff Bill Gross inspected the Kum & Go facility and discovered evidence of a leak at the westernmost pump dispenser. The sand backfill beneath the dispenser was saturated with gasoline. Mr. Gross ordered the nozzles to be bagged and required action to remediate the leak. In addition, the ATG system test reports showed numerous failures and inconclusive results, with no acceptable passing test report for Tank 1 (north tank).
7. On January 13, 2010, additional residences contacted the Nevada Fire Department to report petroleum fumes or odor. The Department's Tom Collins requested that Ivan

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Hankins of the Iowa Department of Agriculture and Land Stewardship's Weights and Measures Bureau inspect the above mentioned westernmost pump. Mr. Hankins reported product pumping out the side of the Blackmer pump when the pump was engaged.

8. On January 14, 2010, Seneca Environmental Services began installation of a well near the westernmost dispenser, and in the process discovered four inches of gasoline as free phase product. Seneca then excavated contaminated soils from the site. The leak was determined to be from a machined hole (vent) in the Blackmer pump. Whenever the pump was engaged, product pumped out through this hole.

8. The above reports of a leaking pump/dispenser all refer to the same westernmost pump, and references to inconclusive or failing ATG tests refer to the north tank which provides fuel to the westernmost pump.

9. At no time during the above listed events did Kum & Go report a suspected or confirmed release of petroleum product to the Department.

10. Following the above events, Kum & Go has undertaken site assessment and remediation actions at the facility. Remediation, monitoring, and reporting activities are ongoing at the site.

IV. CONCLUSIONS OF LAW

The parties hereby agree that the following conclusions of law are applicable to this matter:

1. Iowa Code chapter 455B, Division IV, Part 8 (sections 455B.471-455B.479) establishes the Underground Storage Tank (UST) program. Section 455B.472 declares that the release of regulated substances, including petroleum products, from USTs constitutes a threat to the public health and safety and to the natural resources of the state, and this regulatory program is necessary to adequately address this concern. Iowa Code section 455B.474 authorizes the Environmental Protection Commission (Commission) to adopt rules related to release detection and prevention, financial responsibility, tank closure, site assessment, risk classification, corrective action, and reporting and record keeping requirements applicable to all owners and operators of USTs. The Commission has adopted such rules in 567 I.A.C. chapters 135 and 136.

2. Iowa Code section 455B.471(6) defines an "owner" of USTs. Kum & Go was an owner of USTs at the above referenced facility at all times relevant to this Order.

3. Iowa Code section 455B.471(5) defines "operator" of USTs as "...a person in control of, or having responsibility for, the daily operation of the underground storage tank." Kum & Go is an operator of the above referenced facility and has been at all times relevant to this Order.

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4. "Petroleum" is a "regulated substance" as defined in Iowa Code sections 455B 471(7) and (8). "Release" is defined in Iowa Code section 455B 471(9).

5. The Commission has adopted rules related to the reporting of suspected releases of petroleum. Subrule 135 6(1) reads:

Reporting of suspected releases. Owners and operators of UST systems must report to the department within 24 hours, or within 6 hours in accordance with 567—Chapter 131 if a hazardous condition exists as defined in 567—131.1(455B), or another reasonable time period specified by the department, and follow the procedures in 135 8(1) for any of the following conditions:

a. The discovery by owners and operators or others of released regulated substances at the UST site or in the surrounding area (such as the presence of free product or vapors in soils, basements, sewer and utility lines, and nearby surface water);

b. Unusual operating conditions observed by owners and operators (such as the erratic behavior of product dispensing equipment, the sudden loss of product from the UST system, or an unexplained presence of water in the tank), unless system equipment is found to be defective but not leaking, and is immediately repaired or replaced; and

c. Monitoring results from a release detection method required under 135 5(2) and 135 5(3) that indicate a release may have occurred unless:

(1) The monitoring device is found to be defective, and is immediately repaired, recalibrated or replaced, and additional monitoring does not confirm the initial result; or

(2) In the case of inventory control, a second month of data does not confirm the initial result.

6. In addition, 567 I.A.C. 135 6(3) requires owners and operators to immediately investigate any suspected release of a regulated substance.

7. Kum & Go violated 567 I.A.C. 135 6 by failing to notify the Department of suspected or actual releases, including but not limited to the following:

- 1) on August 31, 2007, the discovery of the leaking dispenser by Mr. Pottebaum,
- 2) on January 5, 2010, the ATG system showing a failed test, suggesting a release as noted by the Department's Kate Bason,
- 3) an early January 2010 suspected release, based on numerous inconclusive and failed test results from the ATG system, and a lack of a passing test result for Tank 1 (the north tank) as noted by Bill Gross on January 11, 2010, and
- 4) the January 7, 2010 customer report of a release from the leaking dispenser, evidence of which was observed on January 11, 2010 by the Department's Bill Gross in the form of a continuing active leak and the saturated sand backfill beneath the dispenser.

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V. ORDER

THEREFORE, the Department hereby orders and Kum & Go agrees to the following:

1. Kum & Go shall pay to the order of the Iowa Department of Natural Resources an administrative penalty of \$10,000 within 30 days of receipt of this Order.
2. Kum & Go shall continue its existing remediation and monitoring efforts at the facility and undertake such additional remediation, assessment, monitoring, and/or reporting activities as may be required by statute or administrative rule.

VI. PENALTY

1. Iowa Code section 455B.477 authorizes the assessment of civil penalties in Iowa District Court of up to \$5,000 per day of violation for the violations involved in this matter. More serious criminal sanctions are also available pursuant to that provision.
2. Iowa Code sections 455B.476 and 455B.109 authorize the Commission to establish by rule a schedule of civil penalties up to \$10,000 which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties. See 567 I.A.C. 10. Pursuant to this rule, the Department has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an Order with a penalty.

ECONOMIC BENEFIT: Due to its failure to report a release to the Department, Kum & Go benefitted economically by deferring the cost of actions it is now required to take to address the release. For the purposes of this factor, the August 31, 2007 leak report will be used as the start of the unreported release. The Department was not made aware of the release until January 2010. This provides a minimum period when a release went unreported for 27 months, delaying any needed response by that length of time. Actions now required, and the estimated cost of carrying them out, include a Tier 2 assessment (\$16,000), a Corrective Action Design Report (\$1,350), over excavation (\$165,000), and Site Monitoring Reports (9 reports totaling \$12,000). The total estimated deferred cost is \$194,350. Using this total deferred cost and applying Iowa Department of Revenue interest rates for the relevant time period produces the following:

September - December 2007: $\$194,350 \times 0.8\%/\text{mo} \times 3 \text{ months} = \$4,664.40$
January - December 2008: $\$194,350 \times 10\%/\text{yr} = \$19,435.00$
January - December 2009: $\$194,350 \times 8\%/\text{yr} = \$15,548.00$
Total interest earned on deferred costs = \$39,647.40

GRAVITY: The release or releases involved impacted residences and sanitary and storm sewers. Investigation of the release involved several state and local agencies, including multiple days and nights of work by the Nevada Fire Department. Residents

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impacted by the release were forced to open windows to ventilate their homes in the face of a winter storm warning and below zero temperatures. Due to the serious nature of the violation, \$3,000 is assessed for this factor.

CULPABILITY: Kum & Go was repeatedly made aware of problems with its system in the form of multiple reports of the dispenser leaking and multiple ATG test irregularities. Despite this notice, it failed to report to the Department in a timely manner. Therefore, \$3,000 is assessed for this factor.

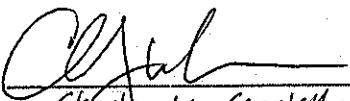
The total penalty calculation from the above three categories is \$45,620.40. As the Department may only assess administrative penalties up to \$10,000, the total assessed penalty is \$10,000.

VII. WAIVER OF APPEAL RIGHTS

Iowa Code section 455B.476, and 561 I.A.C. 7.4(1), as adopted by reference by 567 I.A.C. chapter 7, authorize a written notice of appeal to the Commission. This Order is entered into knowingly by and with the consent of Kum & Go. By signing this Order all rights to appeal this Order are waived.

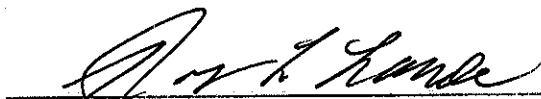
VIII. NONCOMPLIANCE

Compliance with Section V of this Order constitutes full satisfaction of all requirements pertaining to the violations described in this Order. Failure to comply with this Order may result in the imposition of administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.477.



Charles W. Campbell, Vice President, Kum & Go, L.C.

Dated this 22nd day of April, 2011



ROGER L. LANDE, DIRECTOR
IOWA DEPARTMENT OF NATURAL RESOURCES

Dated this 28th day of April, 2011

Kum & Go, L C; Tom Collins; Aaron Brees; V(B), IV(A)